Supreme Court, U.S.
FILED

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No. 00

IN THE

Supreme Court of the United States

JOHN MALOWNEY,

Petitioner,

v.

STATE OF FLORIDA
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERIORARI

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40pp

QUESTIONS PRESENTED

Does the Florida post-garnishment scheme violate the Supremacy Clause of the United States Constitution as well as the Due Process Clause by failing to protect assets that had been declared exempt from debt collection activities?

Does a disabled veteran whose sole source of income, Veterans and Social Security benefits which are exempt from garnishment have standing to challenge a constitutionally defective (notice wise) state garnishment statute after the writ of garnishment is dissolved?

Has the United States Court of Appeals for the Eleventh Circuit established a bar to future challenges to the Florida Garnishment Statute?

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Petitioner, John Malowney respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Malowney v. Hodges, 98-2610(App.A). The opinion of the United States District Court for the Middle District of Florida (Hon. Susan Bucklew, J.) is reported at Malowney v. Kass Hodges, 96-2585(M.D. Fla.) (App. B).

STATEMENT OF JURISDICTION

The first judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 29, 1999. A suggestion for rehearing was filed on November 17, 1999, and the United States Court of Appeals for the Eleventh Circuit denied it on December 1, 1999 (App. C).

This court has jurisdiction to review the Eleventh Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 6, Clause 2, Supremacy Clause of the United States Constitution provides a state law is invalid if it stands as an obstacle to accomplishment and execution of the full purpose and objectives of congress.

Notice of seizure, or attempt to seize, property of debtor is a fundamental element of the due process under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Social Security Act at 42 U.S.C. § 407 provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Florida Statute 744.626 (1984) entitled-Exemption of benefits from claims of creditors, provides:

> Except as provided by federal law, payments of benefits from the United States Department of Veterans Affairs or the Social Security Administration to or for the benefit of a disabled veteran or the veteran's surviving spouse or dependents are exempt from the claims of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt of the payments by the guardian or the beneficiary.

STATEMENT OF CASE

This case raises the question whether a disabled veteran whose sole source of income, Veterans and Social Security benefits which are exempt from garnishment, has standing to challenge a constitutionally defective (notice wise) state garnishment statute. In support of the veteran's challenge are the rulings directly on point by the First, Third, and Fourth Court of Appeals. In those cases all three judgment debtors were likewise recipients of exempt social security benefits. All three Court of Appeals found the plaintiffs did indeed have standing to seek declaratory relief. In the instant case the Middle District of Florida also found the plaintiff had standing to bring an action for declaratory relief. In addition, all three Appellant Courts as have the District Courts of New York, and Arizona ruled their

respective state statute violated the Supremacy Clause for failing to protect assets that have been declared exempt from debt collection activities.

At the heart of this challenge are two constitutional rights issues, a violation the Supremacy Clause of the United States Constitution, and a violation of the Due Process Clause of the Fourteenth Amendment.

The issue of standing only became fatal when the United States Court of Appeals for the Eleventh Circuit substituted their independent ruling that the appellant now lacks standing. The Court of Appeals did not affirm the District Court's original ruling, a ruling from which the appeal was taken, that the complaint failed to state a cause of action. Nor did they address the alleged Supremacy Clause violation. See page 5, App. A.

The appellant contends it was an error for the District Court to omit the core argument, the 20 days the garnishee has to answer the writ and simply rule that the 5 days the creditor has to notify the debtor is sufficient notice. See page 12, App. B. In addition, the District Court omitted any comment regarding the Supremacy Clause violation. Fundamental fairness requires the core argument be addressed directly as well as the Supremacy Clause issue since it was a ruling on the merits.

The appellant argues that the United States Court of Appeals for the Eleventh Circuit erred by ruling the appellant lacks standing to challenge a defective state garnishment statute. The ruling splits the circuits on the issue of standing regarding an important constitutional rights question. Furthermore, the ruling now bars any future challenge with a mootness rationale since the money was returned and the bank and creditor now know the funds are exempt, it is unlikely that another garnishment would ever occur in the future.

At oral argument, Judge Barkett of the Eleventh Circuit put the central question to the State of Florida counsel when she asked "Why does the state need 25 days to provide an official notice to the debtor?" The state had no answer to that pertinent question. It is that question that is the essence of this case.

A. Background

In 1987, a now defunct Savings and Loan, "Freedom", obtained a state court judgment against M.K. Enterprises of Tampa, Inc., now defunct, and the appellant, John Malowney. The judgment was assigned to the Resolution Trust Corporation, "R.T.C.". The "R.T.C." garnished the appellant's checking account and after many months, more than six months, the state court ruled the funds were exempt from garnishment and ordered the funds released.

In 1992, the "R.T.C." sold the "Freedom" judgment to Charles Mayall in California as a package of 1500 judgments for ½ a penny on the dollar. Mayall also received the depositions of the judgment debtor, the appellant here, that revealed the appellant's source of income was from social security and veterans disability benefits. In 1992, the Appellant spoke with Mayall in an effort to resolve the judgment. The appellant told Mayall directly his income was exempt from garnishment.

In May 1995, "Kass Hodges", a Florida law firm, employed by the fifth assignee of the judgment, First National Credit, Inc., induced the Clerk of the Circuit Court of Hillsborough County, Florida, to issue a writ of garnishment directed to the checking account of the appellant at Fort Knox, Kentucky. Army National Bank, "A.N.B." acted on the invalid writ and immediately froze the account and started bouncing checks. Appellant received nonsufficient funds, "N.S.F.", notices approximately a week later. After several calls the appellant learned of the garnishment but was not told who directed the writ. No official notice was ever provided to the Appellant.

The Appellant sued the debt collector, "Mayall" in Count III for a Fair Credit Reporting Act violation. Count II was against attorneys, "Kass Hodges" for wrongful garnishment. Count I is against the Clerk of Hillsborough County Court, Richard Ake, "Ake", for 42 U.S.C. § 1983 claim.

The Count III, "F.C.R.A." was barred by a res judicata ruling. Count II, wrongful garnishment, was refiled and settled in state court. Count I, the 1983 action is the issue of this Writ of Certiorari.

B. The Proceedings Below.

On September 22, 1997, the Middle District of Florida denied the Clerk of the Hillsborough County Court's motion to dismiss. The Court ordered the clerk to address the constitutionality of Florida's Garnishment Statute more directly. In that ruling, the Middle District of Florida cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

> The Federal Rules of Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley*, 355 U.S. at 47. All that is required is "a short and plain statement of the claim." Fed. R. Civ. P. 8 (a) (2). The standard on a 12 (b) (6) motion is not whether the plaintiff will ultimately prevail in his theories, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove allegations. *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F. 2d 1577, 1579 (11th Cir. 1986).

On April 20, 1998, the Middle District of Florida granted the Clerk of the Hillsborough County Court's Motion to dismiss stating the appellant failed to state a Section 1983 claim. See App. B, page 16.

The Middle District of Florida held that the notice provision of Florida's postjudgment garnishment statute provides that, once the writ is issued and within five days of the garnishee's answer:

> [T] he plaintiff shall serve, by mail, the following documents: a copy of the writ, a copy of the answer, a notice, and a certificate of service. The notice shall advise the recipient that he or she must move to dissolve the writ within the time period set forth in § 77.07 (2) or be defaulted and that he or she may have exemptions from the garnishment which must be asserted as a defense.

The Middle District of Florida ruling completely omitted the core argument concerning Fla. St. § 77.04 Writ; form which states:

> The writ shall require the garnishee to serve an answer to it on plaintiff within **20** days after service stating whether he or she is indebted to defendant at the time of the answer, ...

On October 29, 1999, the Court of Appeals for the 11th Circuit in their published ruling stated:

> "Because the Malowneys failed to allege in their amended complaint any facts from which we could reasonably conclude that they will suffer future injury from the application of the statute they challenge as unconstitutional, we conclude they lack standing under either 42 U.S.C. § 1983 or 28 U.S.C. § 2201 to obtain declaratory relief concerning the statute, and we affirm the district court's dismissal of the amended complaint. But we base our affirmance on that ground, instead of the ground used by the district court, which was that the complaint failed to state a cause of action. (See App. B, page 5.)

Thus the 11th Court of Appeals affirmed the District Court's dismissal to the Section 1983 claim. The Court of Appeals for the 11th Circuit did not rely on the previous rulings by the 1st, 3rd, or 4th Court of Appeals in their opinion that the appellant lacked standing.

REASONS FOR GRANTING THE WRIT

The only Supreme court case to confront a postjudgment garnishment statute is that of *Endicott v. Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288-89 (1924), in which the court held that New York's postjudgment garnishment statute, which provided neither notice nor a hearing, did not deprive the judgment debtor of due process. In broad language, the Court declared:

> (T)he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered

> against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

See page 12 of App. B.

Although outside the context of postjudgment garnishment[1], the Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1979), articulated a three pronged balancing test for analyzing the constitutionality of a challenged government procedure that allegedly deprives individuals of liberty or due process rights.

See page 13 of App. B.

After the *Endicott* ruling in 1924, Congress enacted the Social Security Act along with a provision 42 U.S.C. § 407 which provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

It is this federal law that makes the *Endicott* ruling outdated (see *Finberg v. Sullivan*, 634 F.2d 50, 56(3rd Cir. 1980) and suggests a need for a current Supreme Court ruling addressing the constitutional questions of Due Process Clause and Supremacy Clause violations as they relate to garnishment notices and the exemption of social security benefits. This issue is very broad based since the Social Security Act affects the majority of Americans.

Congress has specifically set out in federal law that these benefits are exempt from garnishment. The social security exemption mandates and garnishment statutes present important constitutional rights questions that conflict with the administration of the Social Security Act.

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[1] It may be noted that neither *Mathews* nor the Supreme Court cases from which it evolved dealt with the due process rights of postjudgment debtors.

The Appellant contends the twenty five (25) day notice provision of the Florida garnishment statute is no notice at all. It is neither timely nor informative in plain easy to understand language. The garnishment "takes" the recipient's exempt benefits and maybe 25 days later the debtor will get a official notice from the creditor's attorney. The notice does not inform the debtor of the little known exemption mandates concerning Social Security and Veteran's benefits. It requires the debtor to take immediate legal action or forfeit their funds.

The Florida garnishment scheme insures the debtor is immediately impoverished and left uninformed of their rights in the garnishment action. A prompt and informative notice would resolve this situation.

After the exempt funds were garnished, the Appellant's experience was total chaos. "A.N.B." acted on the invalid writ, bounced two previously paid checks and intended not to pay the remaining 26 outstanding checks. Their policy was to remove the N.S.F. fees from the proceeds, then contrary to the writ's instructions, send the balance directly to the creditor's attorney.

No amount of pleading with "A.N.B." could get them to comply with the law. Their attitude was pure prejudice against the debtor. Only after hiring an attorney and paying his fee up front, with funds that had to be borrowed by the social security recipient, did "A.N.B." abandon the illegal garnishment. The creditor's attorney, expecting a check from "A.N.B." refused to stop the garnishment. The creditor's attorney, when confronted with the question why was the writ issued out of jurisdiction stated "We throw it against the wall and see if it sticks. You'd be surprised how often banks send us the money."

There is absolutely no reason why Florida needs twenty five (25) days to provide an official notice to debtors. Banks are not required to inform the debtors of any thing more than a nonsufficient funds notice. The whole process is outdated. The debtor has no idea who directed the writ. The seizure of the bank account takes all the funds for the necessities of life. In contrast, garnishment of wages is limited to 25%. See *Finberg v. Sullivan*, 634 F.2d 50, (3rd Cir. 1980). It is that difference that makes the debtor's interest compelling over the creditor's interest when applying the *Mathews* balancing test.

The Florida garnishment scheme provides the creditor an incentive to garnish the debtor's exempt benefits. Section 77.055 requires the defendant to assert the exemption or be in default. Federal law prohibits the attachment of the funds but the Florida law provides a means to circumvent these exemption mandates.

It is that provision in the Florida garnishment statute that the creditor's attorney insisted allowed for the garnishment of Social Security funds. The creditor's defense in the wrongful garnishment claim was "If the debtor doesn't assert the exemption, we are by Florida law entitled to keep the funds".

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE PRIOR RULINGS BY THE FIRST, THIRD, AND FOURTH COURT OF APPEALS ON AN IDENTICAL CONSTITUTIONAL CHALLENGE TO A DEFECTIVE STATE GARNISHMENT STATUTE. THOSE COURTS OF APPEALS FOUND VIOLATIONS OF THE DUE PROCESS CLAUSE AND THE SUPREMACY CLAUSE FOR FAILING TO PROTECT ASSETS THAT HAVE BEEN DECLARED EXEMPT FROM GARNISHMENT. ALSO, ALL THE THREE COURT OF APPEALS FOUND THE SOCIAL SECURITY RECEIPIENT DID HAVE STANDING TO BRING AN ACTION FOR DECLARATORY RELIEF REGARDLESS OF THE FACT THE EXEMPT FUNDS WERE RELEASED FROM GARNISHMENT.

Finberg, supra, the Third Circuit Court of Appeals was the first Circuit Court to confront the question of what amount of due process should be afforded to a social security recipient whose benefits which are exempt are garnished. *Finberg* offers the most detailed analysis of the constitutional questions raised in this writ. In an *en banc* decision the *Finberg* court stated:

> Pennsylvania post judgment garnishment procedures, which permitted creditor to take **15** days to respond to petition to set aside

> garnishment, did not require hearing with sufficient promptness to satisfy requirements of due process, and failure of prescribed notice to inform social security recipient of exemptions that might apply to her property and of process for claiming such exemptions also violated social security recipient's due process rights, and thus procedures for postjudgment garnishment of social security recipient's bank account were unconstitutional.
>
> Pennsylvania procedures for postjudgment garnishment of bank accounts conflicted with section of Social Security Act exempting benefits from execution, levy, attachment, garnishment, or other legal process, and thus such procedures were invalid under supremacy clause.

In 1983, the Court of Appeals for the Fourth Circuit in *Harris v. Bailey*, 675 F.2d 614 (4th Cir. 1983), found there was a justifiable controversy with respect to Mrs. Harris, the judgment debtor-social security recipient, under the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

These holdings are in conflict with the recent Court of Appeals for the Eleventh Circuit's ruling below. Furthermore, the *Harris* court ruled:

> Virginia postjudgment garnishment procedures violated due process right of social security recipient whose bank account, containing proceeds from social security checks, her only source of income, was seized, and who did not receive garnishment notice until **six days** after service on garnishee bank, was not afforded notice that social security benefits were exempt from state garnishment proceedings and was not afforded appropriate hearing; balancing of creditor's and debtor's rights required that notice to debtor be served in a timely manner, either simultaneously with or within reasonable time after garnishment, that notice apprise debtor of procedure for asserting exemptions or contesting garnishment, and that hearing be conducted within meaningful time.
>
> Virginia postjudgment garnishment procedures, permitting judgment creditor to freeze social security recipient's bank account without

> regard to whether account contains social security funds, which, under federal law, are exempt from judgment are invalid under the supremacy clause.

In 1985, The United States Court of Appeals for the First Circuit in *Dionne v. Bouley*, 757 F. 2d. 1344 (1st Cir. 1985) states:

> Challenge to Rhode Island postjudgment attachment procedure was capable of repetition, yet evading review so as not to be moot even though plaintiff's bank account was released at or before time she filed action.
>
> Due process was not afforded by Rhode Island postjudgment attachment procedure which failed to provide judgment debtor with prompt and adequate informative notice that her property had been attached, of existence of exemptions to which she might be entitled or of means available for asserting such exemptions, and which lacked express provision for prompt postattachment hearing at which to assert any exemption.

On pages 6 and 7 of App. B, the Court of Appeals for the Eleventh Circuit stated "the facts alleged in the complaint are sparse". The Court of Appeals said they were looking for facts that speak to future injury. Facts by definition only speak to what actually happened and not to a future event. However, the facts were sufficient for a ruling on the merits by the District Court. The amended complaint was supported by affidavits sufficient to meet the standing requirements. The District Court also was aware of two unsatisfied judgments through the pleadings.

Both the Middle District of Florida and the Court of Appeals for the Eleventh Circuit were silent on the alleged supremacy clause violation.

Notice of seizure, or attempt to seize, property of a debtor is a fundamental element of due process. *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178 (S.D., N. Y.1982).

The constitutional issues of due process and supremacy clause violations are not identical issues. **Prompt** notice is the essential deficiency in the due process violation. The supremacy clause violation is more than notice.

In determining whether state law violates the supremacy clause requires the court to examine first the purpose of the federal law and, second, the effect of operation of state law on those purposes. Neither court, the Middle District of Florida nor the Court of Appeals of the Eleventh Circuit, in their rulings examined the Florida law in relationship to the alleged supremacy clause violation. The appellant contends both courts erred by not addressing the alleged supremacy clause violation set out in the amended complaint.

In balancing creditor and debtor rights it should be recognized that the creditors have a significant advantage over debtors in the debt collection process. First, the creditor can compel the debtor annually to disclose their assets at discovery. The creditor's attorney can review the debtor's tax returns, income source, and actually look into the debtor's checking account in detail going back over several years.

Also the creditor is allowed by law to review the debtor's credit reports which today are very sophisticated and detailed. Then the creditor can apply even more pressure on the debtor by requesting a contempt of court hearing for anything the creditor dislikes about the discovery process.

Finally, the harshest of all of the creditor's tools is the writ of garnishment because it "takes" all the debtors money. It causes havoc to his bank account, inflicts financial damage by the high cost of penalties and possibly could result in an arrest for bouncing checks. Or worse yet, cause the dependant wife, an innocent party, to get arrested on worthless check charges.

Prompt notice is the only solution. In view of the overwhelming case law directly on point by three Courts of Appeals and the large number of veterans and social security recipients in Florida, the state of Florida should follow the example set by the Arizona legislature (See *Neeley v. Century Finance Co. of Arizona*, 606 F. Supp. 1453 (D.C.Ariz. 1985)) and change the law to provide a prompt notice of the garnishment action.

CONCLUSION

The merits of this case including the fatal issue of standing have previously been decided by the First, Third, and Fourth United States Court of Appeals. The ruling by the Middle District of Florida is not, in fact, a ruling on the merits because the court omitted the core argument, the 20 days the garnishee has to answer the writ of garnishment. The Appellant complains this omission is not only an error but prejudicial to a true ruling on the merits. The 20 days is significant because in an Arizona ruling, 20 days was too long (see *Neely*, page 1455), a Pennsylvania ruling found 15 days was too long (see *Finberg*, page 51), and a Virginia court found 6 days was not a prompt notice (see *Harris*, page 972). The Florida garnishment scheme does not provide an official notice for 25 days. It is clear that Florida is outside the existing rulings on an identical constitutional challenge to a defective state garnishment statute.

In a legal sense it is especially noteworthy that the United States Court of Appeals for the 11th Circuit did not affirm the Middle District of Florida Court's ruling as rendered on April 20, 1998. The Court of Appeals ruled independently that the Appellant now lacked standing to bring an action for declaratory relief. See page 5, App. B.

In their ruling the Court of Appeals opined that the exempt funds were returned and it is unlikely the bank or creditor would attempt any future garnishment action. The appellant contends this rationale is irrelevant to the issue of standing. It is the rationale for mootness, which was also decided by the sister Court of Appeals. This **published** ruling now has entangled two separate and distinct legal concepts of mootness with standing. This entanglement will bar any future challenges to the defective Florida garnishment statute since the return of the exempt benefits will deny standing to challenge this constitutionally defective state statute.

Thē pro se Appellant asks this Honorable Court to bring constitutional uniformity to the circuits. The Appellant respectfully request this Court rule on the merits of this constitutional challenge to a defective state garnishment statute. The Appellant's claims are fully supported in great detail in the rulings of the First, Third, and Fourth United States Court of Appeals. Those

Courts of Appeals found that all three Social Security recipients did indeed have standing, as did the Middle District of Florida in the instant case. Furthermore, due process does require a prompt official notice and the respective state statutes did violate the Supremacy Clause of the United States Constitution by failing to protect assets declared exempt from garnishment.

Florida is home for millions of veterans and social security recipients who could be subjected to this defective (notice wise) Florida garnishment statute. The State of Florida and the creditor have no compelling need for a twenty five (25) day notice provision. The solution is to provide a prompt notice as adopted by other states so veterans and social security recipients will have a prompt notice of the seizure of their exempt benefits and a procedure that will timely release their exempt funds from garnishment.

This case would allow the Supreme Court to bring uniformity to the circuits on an identical constitutional issue. Also, a Supreme Court ruling could underscore the little known veterans and social security exemptions mandates and visit an issue that adversely impacts thousands of recipients and their dependents that rely on these benefits for their basic necessities of life.

Respectfully submitted,

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[PUBLISHED]

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 29, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2610

D.C. Docket No. 96-2585-Civ-T-24C

JOHN MALOWNEY, SUSAN L. MALOWNEY

Plaintiffs-Appellant,

verses

FEDERAL COLLCTION DEPOSIT GROUP,
CHARLES K. MAYALL, ETAL.,

Defendants-Apellee

Appeal from the United States District Court
For the Middle District of Florida

(October 29, 1999)

Before CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

CARNES, Circuit Judge:

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* Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix A

The plaintiffs, John and Susan Malowney, appeal from the district court's order dismissing Count I of their amended complaint. For the reasons set forth below, we affirm.

I. BACKGROUND

The facts, as alleged in the Malowneys' amended complaint, are as follows. In 1987, Freedom Savings and Loan Association ("Freedom") obtained a state court judgment against John Malowney, in the Circuit Court for Hillsborough County, Florida. In an effort to collect, Freedom hired Charles and Justin Mayall. After the Mayalls' efforts proved unsuccessful, Freedom, on the advice of its lawyer, Kass Hodges, filed with the Clerk of the Circuit Court of Hillsborough County, Richard Ake, a motion for a writ of garnishment pursuant to section §77.03 of the Florida Code.

On May 17, 1995, Ake issued the writ of garnishment, which was directed to the Army National Bank where John Malowney and his wife Susan, maintained a checking account. On May 26, 1995, Army National Bank, as garnishee, froze the funds in the Malowneys' checking account. As a result, the Malowneys' funds were made unavailable to them and the Bank refused to honor checks written on their account.

The complaint is void of any indication that the Malowneys received notice as mandated by the Florida post-judgment garnishment statute, section § 77.055 of the Florida Code. That section requires the judgment creditor to serve, by mail, "a copy of the writ, a copy of the [garnishee's] answer, a notice, and a certificate of service" on the judgment debtor. The required notice must advise the judgment debtor that he may move to dissolve the writ under section § 77.07(2) of the Florida Code, and that he may have exemptions from the garnishment which can be asserted as defenses. The Malowneys did not become aware of the garnishment until they contacted the Bank concerning their returned checks.

The only funds in the Malowneys' checking account at the time of garnishment were social security disability benefits and United States Army

retirement benefits, both of which are exempt from garnishment under federal law. All of the funds attached by the writ of garnishment were subject to exemption under federal law. Pursuant to section § 77.07 of the Florida Code, a judgment debtor may, by motion, obtain dissolution of a writ of garnishment by proving that the attached funds are exempt from garnishment under federal or state law. In this case, the writ of garnishment against the Malowneys' checking account, which contained only exempt funds, was dissolved on July 14, 1995 by order of the state circuit court.

On December 17, 1996, the Malowneys filed pro se their first complaint in federal district court naming Kass Hodges, Thomas Avrutis, Charles and Justin Mayall, The Federal Collection Deposit Group, First National Credit, Inc., Freedom Savings and Loan Association, and Richard Ake, in his official capacity as Clerk of the Circuit Court as defendants. The complaint alleged claims for violations of various state and federal laws.

After obtaining counsel, the Malowneys filed an amended complaint on July 11, 1997.[1] The only count relevant to this appeal is Count I, because that is the only count the Malowneys discuss in their briefs to this Court. *See Rowe v. Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998) (issues not argued on appeal are deemed abandoned); *Marek v. Singletary*, 62 F. 3d 1295, 1298 n.2 (11th Cir. 1995)(Issues not clearly raised in the briefs are considered abandoned.")[2] In Count I, the Malowneys sued defendant Ake in his official capacity seeking only declaratory relief pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C.§ 2201.[3] The Malowneys

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[1] An amended complaint supersedes an original complaint. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F. 2d 594, 601 (5th Cir. 1981).

[2] In their opening brief, at pages 10-11, the Malowneys describe the case as an action "against Richard Ake, Who is the Clerk of the Circuit Court of Hillsborough County, Florida, seeking a declaration that the present system for post judgment garnishment as set forth in Chapter 77 of the Florida Statutes is unconstitutional." That is a description of Count I of the amended complaint, which was against Ake and no other defendant, which sought only declaratory relief. In their reply brief at page 8, the Malowneys expressly declare "that no monetary damages are sought against Ake, that only declaratory relief, which is prospective in nature, is sought." Again, that is about Count I and Ake, not any other counts or defendants. See n.4, infra.

[3] Count I also sought certification of a defendant class action pursuant to Federal Rule of Civil Procedure 23(b)(2). The complaint named Ake as the class representative of all clerks of the circuit courts of Florida, in their official capacity. The district court did not grant class certification, and the Malowneys have not argued to us that the failure to do so was error.

did not seek damages of any kind in Count I of the amended complaint. Specifically, they sought a judgment declaring the notice provisions of section § 77.055 of the Florida Code unconstitutional because those provisions: (1) failed to afford the plaintiffs due process; and (2) violated the Supremacy Clause of the Constitution.[1]

Subsequently, the State of Florida ("State") intervened to address the constitutionality of Florida's post-judgment garnishment statute. The State asked the district court to dismiss Count I of the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), because the Malowneys had suffered no constitutional deprivation and as a result their claim was not cognizable.

On April 20, 1998, the district court dismissed the amended complaint, concluding in regard to Count I that the Florida post-judgment garnishment statute satisfies due process and is constitutional because it provides sufficient notice and an adequate opportunity to be heard. Accordingly, the court concluded that Count I failed to state a claim upon which relief could be granted.

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[1] The Malowneys' amended complaint also contained Counts II and III. In Count II, the Malowneys sought class certification under Federal Rule of Civil Procedure 23(b)(3) against all defendants "except Ake." (We note that the words "except Ake" are manually crossed out in Count II of the amended complaint in the Record Excerpts which the Malowneys filed with us in this appeal. However, the copy of the amended complaint contained in the official record does not have the language except Ake crossed out in that count. It does not matter, because the Malowneys make no arguments concerning Count II, but if they did we would accept as accurate the official record.) In Count II, which explicitly excluded Ake as a defendant, the Malowneys asked for all relief permitted under 42 U.S.C. § 1983, including money damages.

In what they labeled as "Alternate Count II" in the complaint, the Malowneys claimed wrongful garnishment under state law, and sought damages against all defendants, "save Ake." In Count III, the Malowneys alleged violations of the Fair Credit Reporting Act against various defendants, but not Ake.

The district court dismissed Count II, "Alternate Count II", and Count III of the amended complaint. Because the Malowneys have not argued before us that the dismissal of those counts was error, any issues involving them have been abandoned. *See* n.2, supra, and accompanying text.

The Malowneys contend that the district court's dismissal of Count I of the amended complaint was error. They argue that Florida's post-judgment garnishment statute is unconstitutional, and that they are entitled to a declaratory judgment pursuant to either 42 U.S.C. § 1983 or 28 U.S.C. § 2201, which should state that: (1) the statute violates due process, and (2) the statute is invalid under the Supremacy Clause of the Constitution.

II. DISCUSSION

Before we can address whether the district court erred in finding, on the merits, that Florida's post-judgment garnishment statute was constitutional, we must address whether we have jurisdiction over this appeal. *See FW/PBS, Inc. V. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 607 (1990) (federal courts are under an independent obligation to examine their own jurisdiction). Jurisdictional issues are questions of law which we decide *de novo*. *See e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998).

Because the Malowneys failed to allege in their amended complaint any facts from which we could reasonably conclude that they will suffer future injury from the application of the statute they challenge as unconstitutional, we conclude they lack standing under either 42 U.S.C. § 1983 or 28 U.S.C. § 2201 to obtain declaratory relief concerning the statute, and we affirm the district court's dismissal of the amended complaint. But we base our affirmance on that ground, instead of the ground used by the district, which was that the complaint failed to state a cause of action.

The federal courts are confined by Article III of the Constitution to adjudicating only actual "cases" and "controversies." *Allen V. Wright*, 468 U. S.737, 750, 104 S. Ct. 3315, 3324 (1984). The Article III case or controversy requirement sets fundamental limits on the federal judiciary's power in our society. *Id.* One of the most important of these constitutionally-based limits is the requirement that a litigant have " standing" to invoke the power of a federal court. "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of

particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197 (1975). In order to demonstrate that a case or controversy exists to meet the Article II standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future. *See City of Los Angeles V. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665 (1983); *Cone Corp. V. Florida Dep't of Transp.*, 921 F. 2d 1190, 1205 (11th Cir. 1991).

Consistent with the "cases" and controversies" requirement of Article III, the Declaratory Judgment Act, 28 U.S.C. § 2201, specifically provides that a declaratory judgment may be issued only in the case of an "actual controversy." *See Emory v. Peeler*, 756 F.2d 1547, 1551-52 (11th Cir. 1985). Based on the facts alleged, there must be a substantial continuing controversy between two adverse parties. *Id.* at 1552. "The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury." *Id.* (internal quotations omitted).

Thus, in order for this Court to have jurisdiction to issue a declaratory judgment, which is the only redress sought by the Malowneys in Count I, they must assert a reasonable expectation that the injury they have suffered will continue or will be repeated in the future. *See Emory*, 756 F.2d at 1552. "The remote possibility that a future injury may happen is not sufficient to satisfy the 'actual controversy' requirement for declaratory judgments." *Id.* In this case, treating the allegations in the complaint as true and liberally construing the complaint in favor of the Malowneys, we conclude the amended complaint does not contain any allegations which could reasonably support a finding that the Malowneys are likely to be subject to future injury from the application of the statute they challenge.[1]

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[1]Although we must review a complaint to determine whether "it appears beyond a doubt that the plaintiff can prove no set facts in support of his claim which entitle him to relief" *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99,102 (1957), when considering a motion to dismiss for failure to state a claim, we may look only to the facts alleged in the complaint and not beyond. *See Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). The facts alleged in the complaint are sparse.

Appendix A

The complaint does not allege that the Malowneys have checking account funds likely to be subject to garnishment in the future. It does not even allege the Malowneys are still judgment creditors. Even if we assume the Malowneys still owe a judgment debt to Freedom, Freedom is now on notice that the Malowneys' checking account funds are exempt from garnishment under federal law. There is no basis to infer, and certainly it is not alleged, that Freedom will wrongfully attempt to have garnishment issued against an account it now knows to contain exempt funds. Perhaps we could speculate that the Malowneys are now, or will be in the near future be, indebted to a different judgment creditor and as a result will have a garnishment issued against them under the challenged Florida statute. But that possibility is too speculative a basis upon which to rest jurisdiction. It is, in the words of *Emory v. Peeler*, 756 F.2d at 1552, "conjectural, hypothetical or contingent," and not "real and immediate." There must be a substantial likelihood that the plaintiff will suffer future injury: a "perhaps" or "maybe" chance is not enough. *See Lyons*, 461 U.S. at 103; *Cone Corp.*, 921 F.2d at 1205.[6]

Besides, the Malowneys' funds were released from attachment after a court found they were exempt under federal law, and the Malowneys' bank is now on notice that their checking account funds are exempt from attachment. There is no reasonable basis to believe that the bank will freeze the Malowneys' again and risk the liability for doing so, since the bank now knows that the funds are exempt. The Malowneys have not alleged that their account currently contains any funds other than exempt funds, nor have they alleged that they have any other accounts. The mere remote possibility that in some imaginable circumstance the Malowneys could be subject to the

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[6] *Finberg v. Sullivan*, 634 F.2d 50, 55 (3rd Cir. 1980), involved different facts, because in that case the plaintiff remained a judgment debtor, and she was an elderly widow on a modest income, from which the court inferred that the judgment was likely to remain unsatisfied for some time. As we have stated, the Malowneys have not even alleged that they are still judgment debtor, much less that they are likely to remain such for some time. Accordingly, we need not and do not decide whether the facts in Finberg would be sufficient to meet the strictures of our *Emory* decision.

Further, in this case we hold there is no justiciable controversy because the Malowneys lack standing. We never reach the mootness issue.

challenged Florida statute again is "too remote to be labeled a controversy." *Emory*, 756 F.2d at 1552.

The Malowneys argue that since they have alleged they were subject to an injury in the past, the freezing of their assets without adequate notice as required by due process, they have suffered "an invasion of a legally protected interest which is ... concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). Injury in the past, however, does not support a finding of an Article III case or controversy when the only relief sought is a declaratory judgment. *See Emory*, 756 F.2d at 1152. We repeat: The Malowneys have only raised before us the dismissal of Count I and count sought only declaratory relief.

To sum up, the Malowneys' claim for declaratory judgment fails to satisfy the "case or controversy" requirement of Article III or the "actual controversy" requirement of 28 U.S.C. § 2201. *See Lyons*, 461 U.S. at 103, *Emory*, 756 F.2d at 1552. Therefore, a declaration that the Florida post-judgment garnishment statute as applied in the past to these plaintiffs is unconstitutional "would [be] nothing more than a gratuitous comment without any force or effect." *Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980). The Malowneys lack standing to bring an action for declaratory relief, and Count I of the amended complaint should have been dismissed on that ground. Because they have not argued to us that dismissal of the remainder of the amended complaint was error, the judgment of the district court is due to be affirmed.

AFFIRMED.[7]

[7]Appellant's motion for attorney's fees is denied.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION ON PLAINTIFFS' COMPLAINT DATED APRIL 20, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 96-2585-CIV-T-24(C)

JOHN MALOWNEY AND
SUSAN MALONEY,

Plaintiffs

v.

KASS HODGES, P.A.; THOMAS L. AVRUTIS; FEDERAL COLLECTON DEPOSIT GROUP; CHARLES K. MAYALL; JUSTIN K. MAYALL; FIRST NATIONAL CREDIT, INC.; FREEDOM AND LOAN ASSOCIATION; RICHARD AKE, CLERK OF THE CIRCUIT COURT,

Defendants

ROBERT A BUTTERWORTH, in his official Capacity as Attorney General, State of Florida,

Intervenor

_____/

ORDER

Before the Court is the State of Florida's Motion to Dismiss the Amended Complaint (Doc. No. 103, filed November 17, 1997). Plaintiffs have failed to file a response in opposition.

Appendix B

I. BACKGROUND

The dispute out of which this grievance arose occurred in 1987, after the Freedom Savings and Loan Association obtained a judgment against Plaintiff John Malowney in the Circuit Court for Hillsborough County, Florida. Freedom Savings and Loan subsequently employed Defendants Charles and Justin Mayall, Federal Collection Group, and First National Credit to collect the judgment. In 1995, at the advice of the Thomas Avrutis and Kass Hodges, P. A. (together the "Kass Hodges Defendants"), Freedom Savings and Loan filed a Motion for Writ of Garnishment, which Defendant Ake, as Clerk of the County Court, issued. As a result, the funds in the Malowneys' bank account were made unavailable to them. Plaintiffs claim that these funds were Social Security benefits and United States Army Retirement benefits. (Amend. Compl. ¶ 15.)

On February 19, 1996, the Plaintiffs initiated the instant action against the Kass Hodges Defendants, Charles Mayall, the Federal Deposit Collection Group, Justin Mayall, and First National Credit Inc. In addition, Plaintiffs brought suit against the Hillsborough County Clerk (Defendant Ake) who issued the Writ of Garnishment Pursuant to 42 U.S.C. Section 1983 and the Federal Declaratory Judgment Act. Specifically, as against Defendant Ake, Plaintiffs claim that the statute pursuant to which he entered the writ of garnishment, Fla. Stat. ch. 77.055, is unconstitutional.

All the Defendants moved to dismiss. The Court granted the motions to dismiss of the Kass Hodges Defendants and the Mayall Defendants on res judicata grounds. The Court denied Defendant Ake's initial motion to dismiss (in which Ake argued that Plaintiffs' section 1983 claim was "frivolous"), suggesting that Ake would have to address the constitutionality of Florida's Garnishment Statute more directly in order to defeat Plaintiffs' claim. The State of Florida has now intervened to do so, moving to dismiss Plaintiffs' amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds (inter alia) that Plaintiffs have suffered no constitutional deprivation and, thus, that their section 1983 claim is not cognizable.

Appendix B

II. DISCUSSION

In deciding a motion to dismiss, the district court is required to view the complaint in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232,236, (1974). A Complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bank v. Pitt*, 928 F.2d 1108, 1111-12 (11th Cir. 1991) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The only claims remaining in this action are those pursuant to section 1983 against Defendant Ake. Specifically, in Count I of their amended complaint, Plaintiffs seek a declaratory judgment that Florida's Garnishment Statute is unconstitutional and that Defendant Ake thus violated 42 U.S.C. § 1983 by issuing the writ of garnishment. For the purposes of the State's motion to dismiss, the pivotal issue is that of the statute's constitutionallity[1] : and whether it's application deprived Plaintiffs of due process.

> Florida's postjudgment garnishment statute provides:
>
> Every Person who has sued to recover a debt or has recovered judgment in any court against any person, natural or corporate, has a right to a writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person, and any tangible or intangible personal property of defendant in the possession or control of a third person ....

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[1]Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory or the district of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. § 1983 (1994). There are, thus, two components to valid section 1983 action: first, a showing that the injury in question was inflicted "under color of state law" (that is, a showing that those who inflicted it – i.e., the defendants – were "state actors"); and second, a showing that the injury involved a deprivation of "rights, privileges, or immunities secured by the Constitution and laws of the United States." It is only the latter that is in question here.

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Fla. Stat. ch. 77.01. The procedure for obtaining a writ of garnishment is as follows:

> After the judgment has been obtained against defendant but before the writ of garnishment issued, the plaintiff, the plaintiff's agent or attorney, shall file a motion (which shall not be verified or negative defendant's exceptions) stating the amount of the judgment and that movant does not believe that defendant has in his or her possession visible property on which a levy can be made sufficient to satisfy the judgment. The motion may be filed and the writ issued either before or after the return of execution. Fla. Stat. ch. 77.03.

Once the writ is issued and within five days of the garnishee's answer:

> [T] he plaintiff shall serve, by mail, the following documents: a copy of the writ, a copy of the answer, a notice, and a certificate of service. The notice shall advise the recipient that he or she must move to dissolve the writ within the time period set forth in §77.07 (2) or be defaulted ant that he or she may have exemptions from the garnishment which must be asserted as a defense.

Fla. Stat. ch. 77.055.

The debtor may then move to dissolve the writ, at which time "[t] he court shall set down such motion for an immediate hearing." Fl. Stat. ch. 77.07 (1). Upon an unfavorable result at this hearing, "either party" may request that "a jury [be] summoned [impaneled] from the body of the county ... to try the issues." Fl. Stat. ch. 77.08. The question, then, is whether the notice afforded in section 77.055 and the opportunity to be heard afforded in sections 77.07 (1) and 77.07 (1) are constitutionally deficient under the Due Process Clause.[2]

The only Supreme Court case to confront a postjudgment garnishment statute is that of Endicott v. Johnson Corp. v. Encyclopedia Press, Inc., 266

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[2] "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S.Const. Amend. XIV.

U.S. 285, 288-89 (1924), in which the Court held that New York's postjudgment garnishment statute, which provided neither notice nor a hearing, did not deprive the judgment debtor of due process. In broad language, the Court declared:

> [T] he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

Id. at 288. Although outside the context of postjudgment garnishment[3], the Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1979, articulated a three-pronged balancing test for analyzing the constitutionality of a challenged government procedure that allegedly deprive individuals of liberty or due process rights. Under *Mathews*, the three determinative factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 334-35. In *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1363-69 (5th Cir. 1976), the Former Fifth Circuit applied the *Mathews* analysis to Florida's postjudgment garnishment statute and held it to be constitutional.[4]

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[3]It may be noted that neither *Mathews* nor the Supreme Court cases from which it evolved dealt with the due process rights of postjudgment debtors. *See North Ga. Finishing Inc. v. Di-Chem. Inc.*, 419 U. S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

[4]*See also Dionne v. Bouley*, 757 F.2d 1344 (1st Cir. 1985) (applying *Mathews* analysis to address constitutionality of Rhode Island's postjudgment garnishment statute); *Finberg v. Sullivan*, 634 F.2d 50 (3d C. 1980) (enbanc) (applying *Mathews* analysis to address constitutionality of Pennsylvania's postjudgment garnishment statute); *Burris v. Mahaney*, 716 F. Supp. 1051 (M.D. Tenn. 1989) (applying *Mathews* analysis to address constitutionality of Tennessee's postjudgment garnishment statute); *Neeley v. Century Fin. Co.*, 606 F. Supp. 1453 (D. Ariz. 1985); *Reigh v. Schleigh*, 595 F. Supp. 1535 (D. Md. 1984), *vacated*, 784 F. 2d 1191 (4th Cir. 1986). The case for applying *Mathews* to postjudgment, as opposed to

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Looking first to "the private interest that will be affected by the official action" the Court notes that there are two competing interest: that of the creditor and that of the debtor. In a postjudgment proceeding, the interest of the former takes precedence. As the *Brown* court noted,

> Unlike the prejudgment creditor, the [postjudgment] creditor ... has a judicially-awarded judgment that evidences the defendant's debt. Thus, its interest is not the freezing of debtor assets pending adjudication of debt. Instead, it is the enforcement of the judgment against those assets. This factor sharply distinguishes prejudgment from postjudgment garnishment cases.

Brown, 539 F.2d at 1366. Thus, private interest here militates in favor of a finding that the garnishment statute complies with due process. Looking next to the Government's interest, it becomes apparent that "the state interest in facilitating the enforce of judgments," *id.*, to militates in favor of a finding that the garnishment statute complies with due process.

The crucial question, then, is whether the statute presents an untenable "risk of erroneous deprivation of such interests through the procedures used," and, if so, whether that risk would be mitigated by "additional or substitute procedural safeguards." This factor in the *Mathews* analysis trains the Court's attention upon the two key components of due process: notice and an opportunity to be heard. If both are present in sufficient dimension, then there is little "risk of erroneous deprivation" of the debtor's interest. For notice to be constitutionally sufficient, it must be "reasonably calculated

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prejudgment, garnishment statutes is dubious. *Mathews*, after all, would seem to do little to diminish the logic of the *Endicott-Johnson* Court's recognition that a postjudgment debtor has had his or her day in Court and thus has been afforded all the due process constitutionally required. See Diana Gribbot Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligers*, 45 Md. L. Rev. 61, 68-69 (1986). The Florida Supreme Court, addressing the constitutionality of the statute at issue, stated: "The garnishment statutes involved here set forth a procedure to satisfy a debt only after liability has been judicially determined. A judgment debtor has received notice and an opportunity to be heard prior to the entry of the judgment itself." *United Presidential Life Ins. V. King*, 361 So. 2d 710 (Fla. 1978). It is, however, *Brown*, not the Florida Supreme Court's decision in *King*, that has stare decisis impact upon this Court and in light of intervening cases handed down by other Circuits, and amendments to the statute at issue, the Court must reexamine the issue of Florida's postjudgment garnishment statute's constitutionality.

under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The notice provision of Florida's postjudgment garnishment statute provides that, once the writ is issued and within five days of the garnishee's answer:

> [T]he plaintiff shall serve, by mail, the following documents: a copy of the writ, a copy of the answer, a notice, and a certificate of service. The notice shall advise the recipient that he or she must move to dissolve the writ within the time period set forth in § 77.07(2) or be defaulted and that he or she may have exemptions from the garnishment which must be asserted as a defense.

Fla. Stat. ch. 77.055. The *Brown* court, confronting an earlier version of the statute that lacked this notice provision, nonetheless found that it was not deficient insofar as the initial judgment " serves at least to alert the debtor that further legal action may be taken to satisfy the judgment." 539 F.2d at 1368.

Plaintiffs, however, assert that section 77.055 is constitutionally deficient because it did not "advise the Plaintiffs of the nature of their rights to exempt property from garnishment." (Amend. Compl. ¶¶ 29-30.) It is true that in *Finberg*, the Third Circuit held that, in order to be constitutionally adequate, the notice provided a postjudgment debtor must contain detailed explanation of the procedures available for pursuing exemptions and specifically list all, or at least principal, exemptions. See *Finberg* 634 F.2d at 62. Nonetheless, this strained conception of "notice" has been rejected elsewhere. In *Dionne*, for example, the First Circuit stated: "We do not agree that, to be constitutional, the notice provided to the debtor must inform him of all, or even close to all of the available exemptions." *Dionne*, 757 F.2d at 1354. Instead, it is sufficient that the debtor "be informed of the attachment and of the availability of a prompt procedure to challenge the attachment, together with the fact, generally stated, that there are certain exemptions under state and federal law which the debtor may claim with respect to the

attached property." *Id.*; *see also Duranceau v. Wallace*, 743 F.2d 709, 713-14 (9th Cir. 1984); Motz & Baida, *supra*, at 70 ("The failure of the notice required by various postjudgment procedures to identify all (or the principal) exemptions, or to detail formally and laboriously the precise procedures by which a defense can be asserted, is constitutionally unimportant.")

Section 77.05 notifies the debtor of the attachment and of the availability of a procedure for its dissolution and of the existence of exemptions. The Court concludes that this notice is sufficient to meet the notice requirement of due process.

The Due Process Clause also requires "an opportunity to present [one's] objections." *Mullane*, 339 U.S. at 314. The Florida post judgment statute affords just such an opportunity, requiring the court, upon the debtor's dissolution motion, to "set down such motion for an immediate hearing." Fl. Stat. ch. 77.07 (1). In the event that the debtor or creditor is dissatisfied with the results of the hearing, the statute provides for jury trial upon demand. *See* Fl. Stat. ch. 77.08. There is, then, prompt and ample opportunity for the debtor to be heard.

Having concluded that Florida's postjudgment garnishment statute provides both adequate notice and adequate opportunity to be heard, the Court per force concludes that the statute presents slight "risk of erroneous deprivation" of judgment debtors' interests." This, along with the private and governmental interests at stake, compels the conclusion that the statute is not in violation of the Due Process Clause. Because Plaintiffs, as a matter of law, cannot assert that the statute (or Defendant Ake acting pursuant to the statute deprived them of their constitutional right to due process, they have failed to state a section 1983 claim.

Accordingly it is ORDERED AND ADJUDGED that the State of Florida's Motion to Dismiss the Amended Complaint (Doc. No. 103 is GRANTED. All other pending motions are DENIED AS MOOT, and the Court Clerk is directed to close this case.

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DONE AND ORDERED at Tampa, Florida, this 20th day of April, 1998.

s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 1, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-2610-AA

John Malowney,
Susan L. Malowney

Plaintiffs-Appellants,

versus

Federal Collection Deposit Group,
Charles K. Mayall,
Justin K. Mayall, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

PER CURIAM:

The petition (s) for rehearing filed by appellants John Malowney and

Susan L. Malowney is DENIED.

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*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE